BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

ARB 6

In The Matter Of The Petition For Arbitration And Request For Consolidation Filed By MCI Metro Access Transmission Services, Inc.	**MOTION TO DISMISS APPLICATION FOR REVIEW OF NEGOTIATED COMMERCIAL AGREEMENT**

Pursuant to OAR 860-013-0050(3)(a), ORCP 21(A), and the Commission's August 12, 2004 notice in this matter, Qwest Corporation ("Qwest") hereby moves the Public Utility Commission of Oregon ("the Commission") for an order dismissing the application of MCImetro Access Transmission Services, L.L.C. ("MCI") to the extent that it seeks review of the QPP™ Master Service Agreement negotiated between Qwest and MCI.

BACKGROUND AND INTRODUCTION

On July 16, 2004, Qwest and MCI entered into a commercial agreement entitled the "Qwest Master Service Agreement" (the "Commercial Agreement")[1] under which Qwest agreed to provide Qwest Platform Plus™ services to MCI. Qwest Platform Plus™ services are offered under section 271 of the Federal Telecommunications Act and consist primarily of the local switching and shared transport network elements in combination with certain other services.[2] As a result of the D.C. Circuit's decision in *United States Telecom Association v. FCC,* 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), Qwest is no longer required to provide these network elements under sections 251 or 252 of the Act. The Commercial Agreement expressly provides that it does not amend or alter the terms and conditions of existing interconnection agreements

[1] The Commercial Agreement consists of the Qwest Master Services Agreement, Services Exhibit 1 – Qwest Platform Plus™ Service, Attachment A of Service Exhibit 1 (Performance Targets for Qwest QPP™ Service) and the Rate Sheet.

[2] Section 26 of the Commercial Agreement expressly states: "This Agreement is offered by Qwest in accordance with Section 271 of the Act."

between Qwest and MCI.[3] Most importantly, and as explained below, because the Commercial Agreement does not create any terms or conditions for services that Qwest must provide under sections 251(b) and 251(c), it is not an interconnection agreement or an amendment to the existing interconnection agreement between Qwest and MCI.

Also on July 16, 2004, Qwest and MCI entered into a separate agreement that is an amendment to their interconnection agreement in Oregon entitled "Amendment to Interconnection Agreement for Elimination of UNE-P and Implementation of Batch Hot Cut Process and Discounts" (the "ICA Amendment"). The ICA Amendment generally provides for the deployment of a batch hot cut process and contains certain other terms and conditions that may fall within the scope of section 251 of the Act. Both Qwest and MCI have filed the ICA Amendment with the Commission and request the Commission's approval pursuant to Section 252 of the Act.

On July 29, 2004, MCI filed the Commercial Agreement and the ICA Amendment with the Commission and requested that the Commission review and approve both Agreements.[4] However, the Commission rejected the filing because it was not properly filed. Thereafter, on August 12, 2004, MCI refiled the Commercial Agreement with its request for approval, and the Commission issued a notice with a September 2, 2004 date for comments. Meanwhile, Qwest has provided the Commercial Agreement for the Commission's information and is offering its terms and conditions to any carrier assuming the same obligations as MCI.

Notwithstanding the public nature of this Agreement and the offer to make it available to all other carriers, Qwest disputes that the Commercial Agreement falls within the section 252 filing obligation and that Commission has jurisdiction to review, approve or reject the

---

[3] Qwest Master Services Agreement, Section 33.1.

[4] The Commercial Agreement is a fourteen state agreement. The Commercial Agreement that MCI filed with the Commission does not include the complete Rate Sheet. It includes only the portion of the Rate Sheet pertaining to Oregon.

Commercial Agreement. Accordingly, for the reasons that follow, Qwest now moves to dismiss that part of MCI's Application that requests Commission review of the Commercial Agreement.

ARGUMENT

I. The Authority of the Commission to Review and Approve Agreements Under the Federal Act is Governed by Federal Law

Whether the Commission has the power to review and approve the Commercial Agreement is a question of federal law governed by the provisions of the Telecommunications Act of 1996 and the controlling federal authorities construing the Act. There are two primary controlling authorities. The first is the decision of the United States Court of Appeals for the District of Columbia in *USTA II*. The second is the October 2002 FCC decision ("*Declaratory Order*") in a declaratory ruling docket brought by Qwest that defines "the scope of the mandatory filing requirement set forth in section 252(a)(1)."[5] Read together, these authorities definitively establish that the Commercial Agreement is not subject to either sections 251 or 252, and is therefore not subject to review and approval by the Commission.

II. The Commercial Agreement Relates to Network Elements That Are No Longer Required to Be Unbundled Pursuant to Section 251 or 252 of the Act

Under Section 251(d)(2) of the 1996 Telecommunications Act, before an incumbent local exchange carrier such as Qwest can be required to unbundle network elements, the FCC must first lawfully determine, at a minimum, that "access to such network elements as are proprietary in nature is *necessary*" and that "the failure to provide access to such network elements would *impair* the ability of the telecommunications carrier seeking access to provide the services that it

[5] Memorandum Opinion and Order, *In the Matter of Qwest Communications International, Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, WC Docket No. 02-89, 17 FCC Rcd 19337, 2002 FCC Lexis 4929 (Oct. 4, 2002), ¶ 1.

seeks to offer." 47 U.S.C. § 251(d)(2). Absent such a lawful determination, there is no obligation to unbundle under section 251 of the Act.

A simple reading of section 251 makes this clear. Section 251(b)(3) states that ILECs must make network elements available to CLECs, subject to the "necessary" and "impair" standards of section 251(d)(2). Section 251(c)(3) authorizes unbundling only "in accordance with . . . the requirements of this section [251]" (47 U.S.C. § 251(c)(3))— that is, only if the FCC determines that the "impairment" test of section 251(d)(2) is satisfied. As the Supreme Court and D.C. Circuit have held, the section 251(d)(2) requirements reflect Congress's decision to place a real upper bound on the level of unbundling regulators may order.[6]

Congress explicitly assigned the task of applying the section 251(d)(2) impairment test and "determining what network elements should be made available for purposes of subsection [251](c)(3)" to the FCC. 47 U.S.C. § 251(d)(2). The Supreme Court confirmed that as a precondition to unbundling, section 251(d)(2) "requires the [Federal Communications] Commission to determine on a rational basis which network elements must be made available, taking into account the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirements." *Iowa Utilities Board*, 525 U.S. at 391-92.

In *USTA II*, the D.C. Circuit vacated the FCC's impairment determination for mass market switching. *USTA II*, 359 F.3d at 571. In doing so, the Court also expressly stated that "we doubt that the record supports a national impairment finding for mass market switches."

---

[6] *See AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 390 (1998) ("We cannot avoid the conclusion that if Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the [FCC] has come up with, it would not have included §251(d)(2) in the statute at all."); *USTA v. FCC*, 290 F.3d 415, 418, 427-28 (quoting *Iowa Utilities Board's* findings regarding congressional intent and section 251(d)(2) requirements, and holding that unbundling rules must be limited given their costs in terms of discouraging investment and innovation).

Consequently, Qwest is no longer obligated to provide unbundled access to mass market switching under section 251 of the Act. As this Commission recently noted:

> We do not...agree with the assertion that Verizon must continue providing the UNEs at issue until there is a finding that CLECs are *not impaired* without access to those elements. Section 252(d) [sic] requires an affirmative finding of impairment before an incumbent telecommunications carrier can be required to provide a UNE. Absent a legally sufficient finding of impairment by the FCC or this Commission, there is no obligation to unbundle. Order No. 04-369, p. 8.[7]

Further still, this Commission also rejected in docket UM 1100 (the Commission's nine-month Triennial Review Order proceeding)an argument that it has "independent authority under state law" to require continuation of unbundling obligation that the FCC in the *Triennial Review Order* or the D.C. Circuit in *USTA II* eliminated. Specifically, the Commission ruled:

> b) The CLECs emphasize that the Commission has independent authority under state law "to require Qwest to continue to provide existing UNEs under current ICAs and Qwest's SGAT." As Qwest points out, however, the Commission may not lawfully enter a blanket order requiring continuation of unbundling obligations that have been eliminated by the *TRO* or *USTA II* (once the D.C. Circuit's mandate takes effect). Although the Act clearly preserves the authority of State Commissions to authorize unbundling beyond that mandated by the FCC, any such decision must be consistent with the requirements of §251(d). Thus, before a State Commission may authorize unbundling of additional network elements, it must first determine that "failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."
>
> The UNEs currently authorized in Oregon mirror the national list of UNEs adopted by the FCC in its UNE Remand Order. The Commission did not conduct a separate impairment analysis for those UNEs, but rather relied upon the impairment findings made by the FCC. To the extent the D.C. Circuit has concluded that the impairment analysis conducted by the FCC for certain network elements is flawed, there is no legal basis for this Commission to require continued unbundling of those network elements. Before the Commission could mandate such unbundling, it would first have to develop and apply an impairment analysis consistent with the requirements of §251(d)(2). *Ruling* (June 11, 2004), pp. 6-7, docket UM 1100.[8]

---

[7] Order No. 04-369, *In the Matter of VERIZON NORTHWEST INC. Petition for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Oregon Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the Triennial Review Order*, docket ARB 531 (Oregon PUC, June 30, 2004), at p. 8.

[8] Ruling, *In the Matter of the Investigation to Determine, Pursuant to Order of the Federal Communications Commission, Whether Impairment Exists in Particular Markets if Local Circuit Switching for Mass*

Finally, the FCC determined in its *Triennial Review Order* that shared transport is not required to be unbundled under Section 251 of the Act where unbundled switching is not required to be unbundled. *TRO*, ¶ 534.[9]

As discussed in Section III. below, the entire premise of the duty to file an agreement with a state commission under section 252 is based on the fact that the service or element provided is required by sections 251(b) or 251(c).[10] Thus, when, as with switching and shared transport, a service is no longer required by section 251, there is no section 252 obligation to file a privately-negotiated agreement with a state commission, nor does the state commission have section 252 authority in the to review and approve the agreement.[11]

III. In the Declaratory Order, the FCC Ruled that Agreements Like the Commercial Agreement Need Not Be Filed

The 2002 Declaratory Order sets out explicit standards governing the circumstances under which agreements between an ILEC and CLEC must be filed with state commissions. The basic standard is that an ILEC must, pursuant to section 252(a)(1), file any agreement that "creates an *ongoing* obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation." *Declaratory Order*, ¶ 8 (italics in original). The FCC characterized these requirements as properly balancing the right of CLECs "to obtain interconnection terms pursuant

---

Market Customers is No Longer Available as an Unbundled Network Element, docket UM 1100 (Oregon PUC, June 11, 2004), at pp. 6-7.

[9] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338 (FCC rel. August 21, 2003) ("*Triennial Review Order*" or "*TRO*"), ¶ 534.

[10] 47 U.S.C. § 252(a)(1) ("Upon receiving a request for interconnection, services, or *network elements pursuant to section 251*. . . an incumbent local exchange carrier may negotiate and enter into a binding agreement . . . . The agreement . . . shall be submitted to the State commission under subsection (e) of this section.") (Emphasis added.)

[11] The opening phrase of section 252 is instructive on this point. It states that "[u]pon receiving as request for interconnection, services, or network elements **pursuant to section 251** . . . ." 47 U.S.C. § 252(a)(1) (emphasis added). Thus, the obligations of section 252 come into being only if a section 251 service or element is the subject of the agreement.

to section 252(i)" with the equally important policy of "removing unnecessary regulatory impediments to commercial relations between incumbent and competitive LECs." *Id.*

With regard to the issue in this case, the FCC could not have been more clear that there is no requirement that an ILEC file all agreements:

> We . . . disagree with the parties that advocate the filing of *all* agreements between an incumbent LEC and a requesting carrier. . . . Instead, we find that only those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed under section 252(a)(1). *Declaratory Order*, ¶ 8, fn. 26. (Italics in original.)

It is undisputed that *USTA II* eliminated the requirement that switching and shared transport be provided as UNEs under sections 251(b) or 251(c). Thus, the Declaratory Order stands for the clear proposition that Qwest has no obligation to file the Commercial Agreement and the Commission has no authority to review and approve it.

IV. Contracts for Non-Section 251 Network Elements Are Not Subject to State Jurisdiction

As shown above, only agreements pertaining to the provision of services required under sections 251(b) and 251(c) of the Act constitute "interconnection agreements" that must be filed under section 252. The Commercial Agreement does not pertain to an "unbundled network element" under section 251(c) or any other facility or service that must be provided under sections 251(b) or (c), and thus is not within the section 252 filing requirement. In addition, the FCC has jurisdiction over contracts for non-251 network elements that preempts the state commissions from exercising jurisdiction or regulatory review over such contracts.

As explained in more detail below, the FCC, and not the states, have jurisdiction over these elements for the following reasons: (1) in many cases, the elements are required under federal law to be provided on an unbundled basis by RBOCs such as Qwest Corporation under section 271(c)(2)(B) of the 1996 Act; thus, the unbundling obligation is federal, as is the jurisdiction to review the contracts for these elements; (2) network elements remain subject to

federal jurisdiction even after they have been removed from the list of section 251(c)(3) elements; and (3) contracts between carriers for network elements that do not meet the "necessary" and "impair" tests also fall within express federal filing jurisdiction.

First, in the case of Qwest (and other RBOCs), there is an independent investiture of federal jurisdiction under the 1996 Act. Many of the elements which have been removed from the list of unbundled elements must still be unbundled pursuant to section 271(c)(2)(B) of the 1996 Act. *TRO*, 18 FCC Rcd. at 17383-84, ¶ 652. The offering of the switching element, for example, on an unbundled basis pursuant to section 271(c)(2)(B)(vi) is subject to federal jurisdiction.[12] The filing and review (if any) of contracts entered into pursuant to section 271(c)(2)(B) of the 1996 Act is a federal matter which has not been delegated to the states.[13]

Second, network elements made available under the Telecommunications Act are subject to the jurisdiction of the FCC, subject to specific exceptions. *TRO*, 18 FCC Rcd. at 17100-01, ¶¶ 94-95; *USTA II*, 359 F.3d at 594. The FCC's jurisdiction is not diminished whenever a network element is removed from the FCC's list of unbundled elements.[14] What this jurisdictional structure means is that a valid federal policy (in this case the policy favoring market agreements for network elements that have not met the "necessary" and "impair" test) is presumptively preemptive of inconsistent state regulations because the federal nature of the service under the Telecommunications Act automatically brings them into the zone of federal

---

[12] The FCC, in the TRO, confirmed this jurisdiction, noting that it would enforce compliance with section 271 offerings (18 FCC Rcd. at 17385-86, ¶ 655), and that it would apply sections 201 and 202 of the Act to such offerings (*id.* at 17389, ¶ 663).

[13] Of course, state jurisdiction over Section 271 issues is considerably more limited than is the case with section 251, and is advisory only. *See* 47 U.S.C. § 271(d)(2)(B).

[14] *AT&T Corporation v. Iowa Utilities Board*, 525 U.S. 366, 385 (1999) ("Congress has broadly extended its law into the filed of intrastate telecommunications, but in a few specific areas (ratemaking, interconnection agreements, etc.) has left the policy implications of that extension to be determined by state commissions....").

jurisdiction.[15] State filing and review requirements are not permissible because they are inconsistent with this preemptive federal policy.

Third, contracts between carriers for network elements that do not meet the "necessary" and "impair" test also fall within express federal filing jurisdiction. That is, the FCC has the authority to require that all such contracts be filed with the agency and to enforce the Act's section 202(a) non-discrimination requirements with regard to them. As a matter of rule, the FCC has exempted non-dominant carriers from the federal filing obligations applicable to such contracts. No such exemption exists for contracts between ILECs (which are subject to dominant carrier regulation) and CLECs. Furthermore, unlike access services, the Commission has not directed the ILECs to provide these network elements as tariffed offerings. These contracts therefore must be filed with the FCC, but are not subject to prior FCC approval. Concomitantly, states have no authority to duplicate this federal filing requirement (beyond reviewing such contracts for informational purposes only).

Section 211(a) of the Communications Act requires that:

> Every carrier subject to this [Act] shall file with the Commission copies of all contracts, agreements, or arrangements with other carriers, or with common carriers not subject to the provisions of this chapter, in relation to any traffic affected by the provisions of this chapter to which it may be a party.

This statutory language provides an affirmative grant of power to carriers to order their affairs with other carriers by way of contract unless the FCC's rules (or other provisions of the Act) provide otherwise, even when the same business relationship with an end-user customer would need to be dealt with in a tariff.[16] It stands for the legal proposition that Qwest may enter into

---

[15] In other words, the contrary presumption for services assigned to the intrastate jurisdiction by section 2(b) of the Act does not apply because federal jurisdiction over the regulatory treatment of the element has been established.

[16] *Bell Telephone of Pennsylvania v. FCC*, 503 F.2d 1250, 1277 (3d Cir. 1974); *see also In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, Notice of Proposed Rulemaking*, 11 FCC Rcd. 7141, 7190, ¶ 97 (1996);

commercial negotiations with CLECs for the sale of network elements not subject to sections 251(b) or (c), and may enter into binding agreements with those CLECs for the sale of those network elements (even though untariffed sales to end-user customers would generally not be lawful). Pursuant to section 211, Qwest has filed the Qwest/MCI Commercial Agreement with the FCC, thereby complying with that section and perfecting the FCC's jurisdiction over the Commercial Agreement.

The general prohibition against "unreasonable discrimination" applies to such contracts. *MCI Telecommunications Corp. v. FCC*, 842 F.2d 1296 (D.C. Cir. 1988). Carriers may, of course, purchase services from the tariffs of another carrier or choose to tariff their inter-carrier offerings--section 211(a) provides carriers a choice in those instances where the FCC has not acted to actually require either a contract (network elements) or a tariff (exchange access). In point of fact, the current structure whereby interexchange carriers purchase access to local exchange carrier facilities and services pursuant to tariff is of relatively recent origin,[17] and the access tariff regime replaced a system governed largely by inter-carrier contracts and partnerships.[18]

These statutory filing requirements are important because they show a federal regulatory regime (already in place) that deals with the precise issue (filing of contracts for interconnection services not covered by sections 251(b) or 251(c)) that conflicts directly with any state filing requirements applicable to those same agreements. Thus, state filing requirements would conflict irreconcilably with the federal jurisdiction over the network elements covered by the agreements.

In the Matter of the Applications of American Mobile Satellite Corporation, Order and Authorization, 7 FCC Rcd. 942, 945, ¶ 15 (1992); *In the Matter of Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorizations Therefor, Notice of Proposed Rulemaking*, 84 FCC 2d 445, 481, ¶ 95 (1981).

[17] *See In the Matter of MTS and WATS Market Structure, Second Supplemental Notice of Inquiry and Proposed Rulemaking*, 77 FCC 2d 224, 226-31, ¶¶ 12-35 (1980).

[18] *See In the Matter of MTS and WATS Market Structure, Third Report and Order*, 93 FCC 2d 241, 246 (¶ 1), 254 (¶ 39), 256-60 (¶¶ 42-55) (1983).

CONCLUSION

For the reasons set forth above, Qwest respectfully requests the Commission dismiss the application filed by MCI to the extent it seeks review of the Qwest Master Services Agreement.

DATED: September 2, 2004

Respectfully submitted,

Alex M. Duarte, OSB No. 02045
Qwest
421 SW Oak Street, Suite 810
Portland, Oregon 97204
(503) 242-5623
(503) 242-8589 (facsimile)
Alex.Duarte@qwest.com

Attorney for Qwest Corporation

CERTIFICATE OF SERVICE

ARB 6

I hereby certify that on the 2nd day of September, 2004, I served the foregoing **QWEST CORPORATION'S MOTION TO DISMISS** in the above entitled docket on the following persons via U.S. Mail, by mailing a correct copy to them in a sealed envelope, with postage prepaid, addressed to them at their regular office address shown below, and deposited in the U.S. post office at Portland, Oregon.

T. D. Huynh
MCI Worldcom Network Services, Inc.
2678 Bishop Dr., Suite 200
San Ramon, CA 94583

Michel Singer Nelson
Peter H. Reynolds
MCIMetro Access Transmission Svcs.
707 17th Street
Suite 4200
Denver, CO 80202

Michael A. Beach
MCI Worldcom Communications, Inc.
6312 S. Fiddlers Greet Circle
Suite 600 East
Englewood, CO 80111

Thomas Dethlefs
Qwest Corporation
1801 California St., Rm. 4900
Denver, CO 80202-1984

DATED this 2nd day of September, 2004.

QWEST CORPORATION

By: Alex M. Duarte CMB

ALEX M. DUARTE, OSB No. 02045
421 SW Oak Street, Suite 810
Portland, OR 97204
Telephone: 503-242-5623
Facsimile: 503-242-8589
e-mail: alex.duarte@qwest.com
Attorney for Qwest Corporation